within the specified time, nor is he ready to complete it within a reasonable time after the expiry of that period, the seller may rescind the contract and retain the profit."

In 1969 the Indian Supreme Court in *H. C Mills* v. *Tata Air Craft*[1] held at page 1998 that the corresponding Indian section does not apply to earnest money and that (in other words) a party in the position of the company here is entitled to retain it.

Since writing this judgment we have seen a very recent judgment of the Privy Council delivered on 7th December, 1971, in *Linggi Plantations Ltd.* v. *Jagatheesan,* an appeal from a decision[2] of this court, in which their Lordships held that our section 65 did not apply to earnest money.

The same Privy Council judgment also held that section 75 did not apply when a contract was properly terminated and the deposit forfeited, whether or not damages were proved.

In our judgment the company here is entitled to keep the deposit paid by the plaintiff and we would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Chung & Huang.*

WONG LOK KHIAM v. DATO PETER LO SU YIN & ORS. (NO. 3)

[O.C.J. (Lee Hun Hoe J.) February 7, 1972]

[Kota Kinabalu — Civil Suit No. 340 of 1971]

Practice and Procedure — Writ — Representative capacity of plaintiff stated in title — Misnomer — Irregularity — Fresh step in action — Whether can be set aside — R.S.C. 1957, O. 72 r. 2.

Practice and Procedure — Injunction — Interim injunction — Discharge of.

In this action the plaintiff who described himself in the title of the action as "Secretary-General of the Sabah Chinese Association" sued the defendants for a declaration that they were not duly elected officers of the Sabah Chinese Association and sought various orders to restrain them from acting as such officers. The plaintiff obtained an interim injunction but the defendants failed in their application by motion to discharge the injunction. The defendants then tried to set aside the writ, maintaining that the plaintiff had no *locus standi* and was not competent to institute the action, one of the grounds being that the plaintiff not being a registered public officer under the Societies Act 1966 could not sue on behalf of the Sabah Chinese Association.

The facts appear sufficiently from the judgment below.

Held: (1) although the title contains the words "Secretary-General of the Sabah Chinese Association" the indorsement is completely clear of any indication of representative capacity. The misdescription in the title is never fatal and it can always be cured by amendment as in the case of a misnomer. At the most the description is an irregularity and the plaintiff can take steps to amend the writ;

(2) the defendants had knowledge of the irregularity as the same points were raised in the earlier hearing to discharge the interim injunction. Accordingly, by moving the court to discharge the interim injunction, a fresh step had been taken.

[Editorial Note: For earlier proceedings, see *ante* pages 138 and 166].

Cases referred to:-

(1) *Ong Boon Seong* v. *Syed Hussein Alatas* [1971] 2 M.L.J. 218.

(2) *John* v. *Rees & Ors.* [1969] 2 All E.R. 274.

(3) *Bowler* v. *John Mowlem & Co. Ltd.* [1954] 3 All E.R. 556.

(4) *Pearlman (Vencers) S.A. (Pty.) Ltd.* v. *Bartels* [1954] 3 All E.R. 659.

SUMMONS.

W. K. Loo for the plaintiff.

Nicholas Fung for the defendants.

Lee Hun Hoe J.: As a result of a meeting convened by the first defendant on 16th October, 1971, the plaintiff sued the defendants. At the same time he applied for and was granted an interim injunction by Ismail Khan C.J. on 18th October, 1971 until 15th November, 1971 when it was extended by Seah J. For reasons, which I need not have to elaborate, Seah J. was unable to deal with a motion to discharge the interim injunction. On 8th December, 1971 that motion was heard by B. T. H. Lee J. and on 7th January, 1972 he dismissed the application.

On 23rd November, 1971 the defendants entered conditional appearance. By the memorandum of conditional appearance it is endorsed that this appearance is to stand as unconditional unless the defendants apply within fifteen days to set aside the writ, or service thereof, and obtain an order to that effect. For this purpose the defendants took out the present summons on 7th December, 1971.

The defendants maintain that the plaintiff has no *locus standi* and is not competent to institute the action on the following grounds: —

"(1) Under section 9(c) of the Societies Act, 1966 the plaintiff cannot sue on behalf of the Sabah Chinese Association as he is not the registered public officer of the said Sabah Chinese Association and/or

(2) The plaintiff purports to sue as secretary-general of the said Sabah Chinese Association which is not an office recognised in law and in any event no resolution has been passed or other authority has been given to the plaintiff to issue out the writ in this action as secretary-general of the said Sabah Chinese Association and/or

(3) The plaintiff's term of office and that of the former central executive committee of the said Sabah Chinese Association expired on the 8th day of July 1970 and therefore he is *functus officio;*"

In support of the application is the affidavit of the first defendant and an exhibit in the form of a letter dated 12th November, 1971 written by the Timbalan Pendaftar Pertubohan, Sabah. This short letter reads:—

"In reply to your letter dated 11th November 1971, I am to inform you that no member of the Sabah Chinese Association has been declared to and registered by me as the public officer of the association under section 9(c) of the Societies Act, 1966."

The plaintiff did not file any affidavit in reply. Reference was made to affidavits previously sworn by

the plaintiff in support of notices of motion, particularly, one dated 27th October, 1971 used in support of his application for extension of the interim injunction. Paragraph one of this affidavit states: —

"That on the 18th day of October, 1971, as secretary-general of Sabah Chinese Association, I filed a writ against the defendants herein for a declaration that the election of office-bearers at a meeting held on 16th October, 1971 at 10.00 a.m. at Kinabalu Recreation Club was null and void or in the alternative a declaration that the defendants herein unlawfully elected at the said meeting as office-bearers and committee members of central executive committee of Sabah Chinese Association were not duly elected or ought not to have been elected."

Whether the office-bearers were lawfully elected would depend upon whether the election was properly conducted. These and other issues cannot be decided on affidavits but will have to be thrashed out at the trial on the evidence before the court.

Section 9(c) of the Societies Act, 1966 reads: —

"9(c) a society may sue or be sued in the name of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any person registered as an officer of the society."

This provision was also raised in *Ong Boon Seong* v. *Syed Hussein Alatas*[1] where it was held that the plaintiff was competent to sue. Any person who is a member of the party or association has the right to sue.

Mr. Fung for the defendants, pointed out that the case of *Ong Boon Seong* v. *Syed Hussein Alatas, supra,* was distinguishable in that there the plaintiff sued in his personal capacity whereas the plaintiff in the present case sued in a representative capacity and was also not authorised to sue as such.

Mr. Loo, for the plaintiff, stressed that all the points before the courts were raised at the hearing on the motion to discharge the interim injunction. He submitted that the defendants should not raise the same points on the ground of *res judicata.* He cited various authorities to show that since the questions had been raised and argued on previous occasions they should not be raised again. He submitted that since the matter has been determined it should not be raised again.

I am unable to agree with Mr. Loo that *res judicata* applies. The points now raised were also raised in support of the application for the discharge of the interim injunction. B. T. H. Lee J. made clear that the sole question before him was the interim injunction and any issue to be tried must be by evidence at the trial.

There can be no doubt that Seah J. was taken up by the affidavit of plaintiff which I mentioned earlier for he stated in his judgment: —

"In this motion, the plaintiff brings the suit not in his personal capacity but as secretary-general of the Sabah Chinese Association. In exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury. I am satisfied on the affidavits filed herein that the plaintiff has discharged the burden that irreparable damages would result if the interim injunction dated the 18th October, 1971 is not renewed accordingly."

Mr. Loo states that in actual fact the plaintiff is suing in his personal capacity, presumably as a member of the party though it is not so stated anywhere in the writ. If this is so why should plaintiff swear an affidavit that he filed a writ against defendants in his capacity as secretary-general? Nevertheless the title on the writ shows as plaintiff: —

"WONG LOK KHIAM,
Secretary-General of Sabah Chinese Association
No. 6, Beach Street, 1st Floor,
Kota Kinabalu."

Mr. Loo says that the words "Secretary-General of Sabah Chinese Association" are merely descriptive and do not mean that plaintiff is suing in a representative capacity. He maintains that plaintiff is at all material times actually the secretary-general of Sabah Chinese Association and is therefore entitled to sue as such.

In *John* v. *Rees & Ors.*[2] the plaintiff issued a writ in which he claimed:

"as representing all members of the P.D.L.P. except the defendants and personally."

and by notice of motion sought an injunction restraining the defendants from handling the property of P.D.L.P. until trial of the action. The defendants by their notice of motion asked that the writ be set aside or that so much of the plaintiff's claim as sought relief for parties other than the plaintiff should be struck out. It was held that although there was a division of opinion between the plaintiff and those he claimed to represent, so long as there was an interest common to them all as members of the P.D.L.P. in having the issue determined and so long as both sides were fairly argued out, a representative action of this kind was appropriate.

In *Bowler* v. *John Mowlem & Co. Ltd.*.[3] the deceased who was employed by the defendants died as a result of an accident which occurred in the course of employment. The plaintiff, widow of the deceased, sued the defendants. The title of the action being "Between Winifred Bowler (administratrix of Thomas Heney Bowler deceased) plaintiff, and John Mowlem & Co. Ltd., defendants." The grant of letter of administration was not made to the plaintiff well over a year after the issue of the writ. The defendants contended that as the plaintiff was not the administratrix at the date of the issue of the writ, the writ and all subsequent proceedings were a nullity. It was held that the plaintiff must be taken to be suing in her capacity as widow and not in a representative capacity as administratrix, because the indorsement on the writ did not state that she was suing as administratrix and its language was wide enough to cover her claim as widow of the deceased.

As Denning L.J. (as he then was) stated at page 558: —

"The whole question in this case is: Was this action brought by the plaintiff in a representaive capacity as administratrix of her husband? In the title of the writ she is described as administratrix, but, in my opinion, that does not denote a representative capacity. That is simply a description of her status as it was believed to be. The indorsement on the writ is the crucial matter. Under R.S.C. Ord. 3 r. 4(1) the indorsement must show the plaintiff's representative capacity."

Unless the writ is a nullity it may be amended. This is so even after judgment, provided the amendment does not alter the judgment. The authority is *Pearlman (Vencers) S.A. (Pty) Ltd.* v. *Bartels.*[4] In that case the plaintiffs sought leave to amend the writ, all subsequent proceedings and judgment by substituting "Josef Bartels trading as Bernhard Bartels" for "Bernhard Bartels." The defendants contended that the court had no jurisdiction to amend a judgment after it had been entered. The judge granted leave to the plaintiffs to amend. On appeal it was held that the court had jurisdiction to amend the title of the action where the substantive judgment was in no way being altered.

It is true that the plaintiff in his affidavit stated that he sued as secretary-general of Sabah Chinese Association. Whether he is the secretary-general of Sabah Chinese Association may be an issue at the trial. If it were accepted that the plaintiff's term as secretary-general expired on a particular date then it must logically follow that the term of other office-bearers appointed at the same time as the plaintiff must also have expired. Although the title contains the words "Secretary-General of Sabah Chinese Association" the indorsement is completely clear of any indication of representative capacity. But the misdescription in the title is never fatal. It does not make the writ a nullity. It can always be cured by amendments as in the case of a misnomer. If an action is brought in a representative capacity when that capacity does not exist then no amendment can cure that.

Generally speaking the court will make such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute. But the court will not however, decide questions of rights which must await the trial when evidence may be adduced.

I am unable to say that the writ is a nullity. It is at most an irregularity. I see no justification whatsoever for taking such drastic step as to set aside the writ. The plaintiff can take steps to amend the writ.

The application also fails for another reason. R.S.C. O. 72 r. 2 provides that no application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity. The summons was clearly made within time. I think there is substance in Mr. Loo's contention that by moving the court to discharge the interim injunction a fresh step has been taken. That the defendants had knowledge of the irregularity was demonstrated by the fact that the points now raised were raised at the hearing to discharge the interim injunction. The letter of the Timbalan Pendaftar Pertubohan is also relevant.

Accordingly, for reasons given I refuse to set aside the writ. I will hear parties as to costs.

Application refused.

Solicitors: *W. K. Loo & Co.; Nicholas Fung & Co.*

GRAHAM STARFORTH HILL v. THE BAR COUNCIL OF MALAYA & ANOR.

[F.C. (Suffian, Gill Ong Hock Sim F.JJ.) February 21, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 104 of 1971]

Advocates and Solicitors — Admission — Ad hoc — Conditions to be satisfied — Advocates and Solicitors Ordinance, 1947, s. 8A(2)(a).

This was an appeal from the decision of the High Court ([1971] 2 M.L.J. 269), refusing an application by the appellant to be admitted *ad hoc* as an advocate and solicitor of the High Court in Malaya for the purpose of appearing as leading counsel in an income tax appeal case before the Special Commissioners of Income Tax and in any appeal therefrom.

Held, (dismissing the appeal): while it has been demonstrated that the appellant has generally high qualifications and experience in revenue law, it had not been demonstrated that for the particular case he had special qualifications and experience of a nature not available amongst advocates and solicitors in Malaysia.

Per curiam: An applicant for *ad hoc* admission under section 8A of the Advocates and Solicitors Ordinance has to satisfy four conditions: (a) he is a person who if he was a citizen of Malaysia or a permanent resident in Malaysia would be a qualified person within the meaning of the Ordinance; (b) he has been instructed by an advocate and solicitor in Malaysia; (c) for the purpose of that particular case he has, in the opinion of the court, special qualifications or experience of a nature (d) not available amongst advocates and solicitors in Malaysia.

The following authorities were cited: *Lee Wong Tiang* v. *Public Prosecutor; Re S. K. Lee applicant* [1971] 2 M.L.J. 40; *Re Michael John Mustill* [1971] 1 M.L.J. 175.

FEDERAL COURT.

Ronald T. S. Khoo for the appellant.

Gunn Chit Tuan for the Attorney-General.

K. A. Menon for the Bar Council.

Suffian F.J. (delivering judgment of the court): Until 1st January, 1971, there were many lawyers in Singapore who practised in Malaya also, and one of them was Mr. Graham Starforth Hill, but on that date an amendment by P.U.(A) 123 of 1970 to the Advocates and Solicitors Ordinance, 1947, came into force whereby only persons who are citizens of Malaysia or persons who are permanent residents in Malaysia which Mr. Hill is not, can practise as advocates and solicitors in Malaya.

The amendment, however, provides by a new section 8A the Ordinance for the *ad hoc* admission to the Malayan Bar of lawyers such as Mr. Hill. That section reads —

"(1) Notwithstanding anything contained in this Ordinance the Court may for the purpose of any one case and subject to the following sub-sections admit to practise as an advocate and solicitor any person who if he was a citizen of Malaysia or a permanent resident in Malaysia would be a qualified person within the meaning of this Ordinance.

(2) No person shall be admitted to practise as an advocate and solicitor under sub-section (1) unless —

(a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and

(b) he has been instructed by an advocate and solicitor in Malaysia.